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No. 92-1421

In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL J. HALEY, PETITIONER

v.

DEPARTMENT OF THE TREASURY AND MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the conclusion of the Merit Systems Protection Board that petitioner's disclosure of confidential information, in violation of Department of the Treasury standards of conduct, was not protected by the Whistleblower Protection Act because petitioner lacked a reasonable belief that the disclosed information revealed agency misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 977 F.2d 554. The order of the Merit Systems Protection Board (Pet. App. B1-B2) denying review of the initial decision of the administrative judge and the administrative judge's initial decision (Pet. App. C1-C27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. Pet. App. A9. A petition for rehearing was denied on December 2, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on

March 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was dismissed from his position as a senior examiner with the Office of Thrift Supervision (OTS) because he released confidential information about a savings and loan institution, in violation of Department of the Treasury standards of conduct. He challenged his dismissal before the Merit Systems Protection Board, arguing that the disclosure of information was protected by the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8) (Supp. II 1990). The Board rejected that challenge, and the court of appeals upheld the Board's decision.

1. In 1977, petitioner took a position as an examiner with the Federal Home Loan Bank Board. In 1989, when the Bank Board was replaced by OTS under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, petitioner became an examiner for OTS. Pet. App. A1-A2. While at OTS's District Office in Des Moines, Iowa, petitioner became familiar with the fiscal condition of the Marion County Mutual Loan and Building Association (MCM), a savings and loan association in Hannibal, Missouri. *Id.* at C2-C3.

Because MCM did not meet the strict capital requirements prescribed in FIRREA, it was required to submit a capital plan to OTS demonstrating that it could satisfy the requirements within a reasonable period of time. See 12 U.S.C. 1464(t)(1) and (6)(A)(ii) (Supp. II 1990). MCM submitted its capital plan in early 1990. Pet. App. A2. In submitting the plan,

MCM explained that "[t]he primary feature of the Plan will be to complete a conventional conversion to stock form by December 31, 1990, with a simultaneous conversion of net worth certificates and/or accrued interest payable to [Generally Accepted Accounting Principles] equity." *Ibid.*; C.A. App. 248.

In a letter dated April 30, 1990, OTS rejected MCM's capital plan. Pet. App. A2. OTS explained in the letter that it doubted that the proposed conversion would be successful and that an unsuccessful conversion would pose a significant risk to the insurance fund. C.A. App. 87-88. In conjunction with its denial of the plan, OTS asked MCM to sign a consent agreement that would (1) restrict MCM's operations; (2) provide for the appointment of a conservator or receiver; (3) authorize OTS to negotiate a merger or consolidation, subject to MCM's approval; and (4) allow changes in MCM's management. C.A. App. 90-103. MCM signed the consent agreement on July 23, 1990. Pet. App. C25. At the same time, MCM admitted that it did not have sufficient capital and that there were grounds for appointing a conservator or receiver under FIRREA. *Ibid.*; C.A. App. 90.

Meanwhile, petitioner prepared a memorandum dated July 3, 1990, criticizing OTS's rejection of MCM's capital plan. Pet. App. E1-E8.[1] Petitioner addressed the memorandum to Robert Maffitt, the Director of Field Operations for OTS, and sent it to both Maffitt and Bayard Plowman, the managing

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[1] Although petitioner refers to two other memoranda that he prepared regarding MCM, Pet. 6-7, he limits his argument to the disclosures made in the July 3, 1990, memorandum. See Pet. 10-13.

officer of MCM; petitioner urged Plowman to send copies of the memorandum to members of Congress. *Id.* at A2. In the memorandum, petitioner acknowledged that MCM "w[ould] not be able to meet the toughened capital requirements mandated by the FIRREA legislation." *Id.* at E2. He also recognized that the cost of underwriting a stock conversion by MCM "would likely have to be absorbed by the insurance fund in the event the [public] offering [of stock] was not successful," and that MCM's poor financial condition "could certainly reduce the appeal of its stock to the investing public." *Ibid.* Nonetheless, he believed that MCM "may very well" be able to meet FIRREA's capital requirements by the end of 1994 if it were permitted to carry out a stock conversion. *Id.* at E5. He also believed that it would be "just plain wrong" for OTS to replace MCM's board of directors and management, as OTS was permitted to do under the consent agreement that it had asked MCM to sign. *Ibid.* Petitioner suggested that in order to "ensure that [MCM's] management team receives a fair shake," *id.* at E6, OTS consider several options, including allowing MCM to proceed with a stock offering if management was able to provide additional safeguards; exempting MCM from FIRREA's capital requirements; or restructuring MCM's net worth certificates to qualify as core capital, *id.* at E6-E7.

By sending the memorandum to Plowman, petitioner violated Department of the Treasury standards of conduct. Those standards prohibit the disclosure of confidential information to unauthorized persons. See 31 C.F.R. 0.735-47; 12 C.F.R. 510.5(b). On July 26,

1990, petitioner was fired because of that violation. Pet. App. A3.

Petitioner asked the Office of Special Counsel of the Merit Systems Protection Board (MSPB or Board) to investigate his dismissal, alleging that the disclosure of information in the memorandum was protected by the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) (Supp. II 1990).[2] The Office of Special Counsel determined that the disclosure was not protected and accordingly concluded that there was "no basis for further inquiry into [petitioner's] termination as a possible violation of [the Whistleblower Protection Act]." C.A. App. 72.

2. a. Petitioner then filed a challenge to his removal with the MSPB. In an initial decision for the Board, an administrative judge (AJ) rejected petitioner's challenge. Pet. App. C1-C27. The AJ first determined that petitioner could not appeal his removal to the Board pursuant to 5 U.S.C. 7701, because petitioner was not an "employee" for purposes of that provision, see 5 U.S.C. 7511(a). Pet. App. C3-C6.[3] The AJ did, however, find jurisdiction to consider

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[2] The Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990), protects a federal employee from disciplinary action based on

> any disclosure of information * * * which the employee * * * reasonably believes evidences—
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> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[3] That determination was affirmed by the court of appeals, Pet. App. A3-A5, and petitioner does not seek further review of the determination in this Court.

petitioner's claim under the Whistleblower Protection Act, which was before the Board pursuant to 5 U.S.C. 1214(a)(3) (Supp. II 1990) and 1221(a) (Supp. II 1990). Pet. App. C6; see also *id.* at A1.

On the merits of that claim, the AJ determined that the Whistleblower Protection Act did not protect the disclosure of information in petitioner's memorandum. The AJ noted that the Act protects any disclosure that the employee "'reasonably believes evidence[s] a violation of' any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of [a]uthority, or a substantial and specific danger to public health and safety, if such disclosure is not specifically prohibited by law." Pet. App. C8 (quoting 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990)). The AJ concluded that "it was not reasonable for [petitioner], an experienced examiner of savings associations, to believe that OTS's rejection of MCM's capital plan was a violation of FIRREA or the regulations implementing the statute." Pet. App. C16. The AJ observed that the Director of OTS has broad discretion in determining whether to approve a capital plan or an application for an exemption from FIRREA's capital requirements; the statutes provide for submission of a capital plan or exemption application that is "acceptable" to the Director, but they do not prescribe a standard for approval. *Ibid.*; see 12 U.S.C. 1464(s)(4)(A) (Supp. II 1990) and 1464(t)(7)(D) (Supp. II 1990).

The AJ further concluded that petitioner could not reasonably have believed that OTS's rejection of MCM's capital plan evidenced a violation of the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. 2901(b). Petitioner claimed that OTS would

violate the CRA if it merged MCM with Roosevelt Federal Savings and Loan Association, which was based in St. Louis, Missouri, and, according to petitioner, had a poor record of making local loans. Pet. App. C11, C17. The AJ found, however, that petitioner "was merely speculating that Roosevelt would make an application for a merger and then that application [would] be approved and accepted by OTS." *Id.* at C18. Thus, petitioner "had no reasonable basis to conclude that Roosevelt would be the entity that would merge with MCM or that OTS would not proceed in accordance with its responsibilities under the CRA." *Ibid.*

The AJ similarly concluded that petitioner could not reasonably have believed that OTS's rejection of MCM's capital plan constituted an abuse of discretion, gross mismanagement or a gross waste of funds, or posed a substantial and specific threat to public safety. Pet. App. C19-C25. The AJ noted that petitioner's claim of an abuse of discretion was "belie[d]" by the fact that "[petitioner] himself considered the plan risky unless there were some substantial safeguards." *Id.* at C23. The AJ also noted that petitioner "had not talked to any of his supervisors concerning MCM's capital plan prior to [its] rejection." *Id.* at C21. Instead, petitioner "just proceeded to write up his letter expressing disagreement with his superior's actions." *Ibid.* That course of conduct, the AJ determined, "plainly [constituted] a lack of effort and inquiry on [petitioner's] part to learn the * * * facts governing the situation." *Ibid.*

Finally, the AJ rejected petitioner's contention that OTS violated due process and effected an unconstitutional taking of property without compen-

sation by asking MCM to sign a consent agreement. Pet. App. C25-C26.

b. The Board denied petitioner's petition for review of the initial decision. Pet. App. B1-B2; see 5 C.F.R. 1201.113(b).

3. The Federal Circuit "affirm[ed] the Board in all respects." Pet. App. A9. First, the court affirmed the Board's reading of its jurisdictional statutes. *Id.* at A3-A5. Next, the court affirmed the Board's decision on the merits, holding that it was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. While the court emphasized that it had evaluated "all the arguments set forth in the briefs," it declined to address each of the "multitude of arguments" individually, explaining that it limited its opinion to those with "sufficient merit to warrant consideration." Pet. App. A8, A3. In particular, the court rejected petitioner's contention that his unauthorized disclosure of confidential information was protected by the Whistleblower Protection Act. The court agreed with the Board that petitioner "did not have a reasonable belief that OTS's rejection of MCM's capital plan" violated any relevant statute or regulation, in light of petitioner's "experience as an Examiner and the clear language of the relevant authorities." Pet. App. A6, A7.[4]

ARGUMENT

Petitioner renews his contention that his unauthorized disclosure of confidential information was

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[4] The court of appeals also rejected petitioner's contention that he had made a protected disclosure to Congress and that the administrative judge was biased. Pet. App. A7-A8. Petitioner does not renew those contentions in this Court.

protected by the Whistleblower Protection Act because he reasonably believed that the information evidenced agency wrongdoing. The court of appeals correctly rejected that fact-bound contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Whistleblower Protection Act protects a disclosure of information that an employee "reasonably believes evidences" agency wrongdoing. 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990). The MSPB concluded that it was not reasonable for petitioner to believe that the information in his memorandum regarding MCM evidenced wrongdoing by OTS. The court of appeals correctly held that the MSPB's conclusion was supported by substantial evidence. Petitioner's arguments to the contrary are unpersuasive.

Petitioner first argues (Pet. 12) that he reasonably believed that OTS's "threatened removal of management and appointment of a receiver" violated the provision of FIRREA that prescribes criteria for the appointment of a receiver or conservator, 12 U.S.C. 1464(d)(2)(C) (Supp. II 1990). That provision, however, never came into play here, because no receiver or conservator was ever appointed for MCM. At the time petitioner distributed his memorandum, OTS had merely asked MCM to sign a consent agreement under which a conservator or receiver could be appointed. Because OTS's request did not trigger the FIRREA provision governing the appointment of conservators and receivers, petitioner could not

reasonably have believed that OTS was violating that provision.[5]

Petitioner also argues (Pet. 13) that OTS "incorrectly comput[ed] [MCM's] capital" by failing to include MCM's net worth certificates as "core capital," one of the categories of capital for which FIRREA establishes minimum requirements. Petitioner further suggests (*ibid.*) that OTS's failure to include the certificates in core capital violated FIRREA's savings clause.[6] Petitioner's own memorandum defeats this argument, for it reveals that petitioner did not himself believe that the certificates had to be counted as core capital. Petitioner stated in the memorandum that MCM "will not be able to meet the toughened capital requirements mandated by * * * FIRREA." Pet. App. E2. Moreover, by suggesting that the certificates be "[r]estructur[ed] * * * so that they may qualify as core capital," *id.* at E7, petitioner

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[5] If a conservator or receiver had been appointed without MCM's consent, MCM could have sought judicial review of the appointment. 12 U.S.C. 1464(d)(2)(A) and (E) (Supp. II 1990). As it was, however, MCM's board of directors approved the consent agreement and acknowledged that there were grounds for the appointment of a conservator. C.A. App. 90. Thus, MCM's board apparently did not share petitioner's purported view that an appointment would have been illegal.

[6] The savings clause states that FIRREA "shall not affect the validity of any right, duty, or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any other person, which * * * arises under or pursuant to any section of title IV of the National Housing Act * * * [and] existed on the day before the date of the enactment of [FIRREA]." Pub L. No. 101-73, § 401(f), 103 Stat. 356 (codified at 12 U.S.C. 1437 note (Supp. II 1990)).

implicitly acknowledged that as then structured, they did not qualify as core capital.

Petitioner next contends (Pet. 13) that OTS was required to grant MCM an exemption from FIRREA's capital requirements, even though MCM did not submit an acceptable capital plan to OTS. Petitioner is wrong. FIRREA expressly states that any application for an exemption "*shall be* accompanied by a plan which * * * is acceptable to the Director [of OTS]." 12 U.S.C. 1464(t)(7)(D) (Supp. II 1990) (emphasis added); see also 12 U.S.C. 1464(s)(4)(A) (Supp. II 1990). The regulations repeat the requirement that an exemption application be accompanied by an acceptable plan. See 12 C.F.R. 567.10(c). Because MCM did not submit an acceptable plan, OTS was not required to grant it an exemption, and petitioner could not reasonably have believed otherwise, in light of the clarity of the statute and regulations on this point.

Nor could petitioner reasonably have believed that OTS "ignored its responsibility to enforce the Community Reinvestment Act, 12 U.S.C., Sec. 2901 & 2903," as petitioner asserts, Pet. 14. Petitioner alleges that OTS violated the CRA by "planning for [a] merger * * * with an institution [with a poor lending record]." Pet. 14. The CRA would have required OTS to take into account the loan record of an institution before approving its merging with MCM. The CRA did not apply here, however, because OTS did not approve any such merger. Petitioner's speculation that OTS would have violated the CRA if it had approved a merger does not entitle him to protection under the Whistleblower Protection Act.

Petitioner argues that his "objection to the rejection of [MCM's capital] plan was eminently reasonable" since OTS later approved a revised capital plan submitted by MCM. Pet. 15. The relevant question, however, is not whether petitioner's view was reasonable; it is whether OTS's rejection of the plan violated the law or constituted any of the other types of wrongdoing listed in the Whistleblower Protection Act. Petitioner's memorandum fails to suggest agency wrongdoing. On the contrary, petitioner suggested agreement with OTS's rationale for rejecting the plan, noting that he "d[id] not object to the OTS's rel[u]ctance to permit [MCM] to risk the $200,000 required to underwrite a stock conversion," because if the offering were not successful, the expense "would likely have to be absorbed by the insurance fund." Pet. App. E2. It was only after MCM revised its plan by providing personal guarantees for the stock conversion and submitting a list of potential buyers that OTS's concerns were alleviated and the plan was approved.

2. Finally, contrary to petitioner's claim (Pet. 15-16), the court of appeals' decision does not weaken statutory protection for genuine whistleblowers. Published allegations of governmental misconduct remain protected "if [they] meet[] the requisite reasonable belief test." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). But where, as here, the allegations are not founded on a reasonable belief, their dissemination does not "assist[] in the elimination of fraud, waste, abuse, and unnecessary Government expenditures," 5 U.S.C. 1201 note (Supp. II 1990), and is not protected under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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